



4910-22-P

DEPARTMENT OF TRANSPORTATION

[FHWA Docket No. FHWA-2018-0008]

Federal Highway Administration

Surface Transportation Project Delivery Program; Utah Department of

Transportation Audit Report

AGENCY: Federal Highway Administration (FHWA), U. S. Department of Transportation.

ACTION: Notice.

SUMMARY: The Moving Ahead for Progress in the 21st Century Act (MAP-21) established the Surface Transportation Project Delivery Program that allows a State to assume FHWA's environmental responsibilities for environmental review, consultation, and compliance under the National Environmental Policy Act (NEPA) for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for the responsibilities it has assumed, in lieu of FHWA. This program mandates annual audits during each of the first 4 years to ensure the State's compliance with program requirements. This notice finalizes the findings of the first audit report for the Utah Department of Transportation (UDOT).

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Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590.

Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice and all comments received may be downloaded from the specific docket page at www.regulations.gov.

Background

The Surface Transportation Project Delivery Program, codified at 23 United States Code (U.S.C). 327, commonly known as the NEPA Assignment Program, allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities, in lieu of the FHWA. The UDOT published its application for NEPA assumption on October 9, 2015, and made it available for public comment for 30 days. After considering public comments, UDOT submitted its application to FHWA on December 1, 2015. The application served as the basis for developing a Memorandum of Understanding (MOU) that identifies the responsibilities and obligations that UDOT would assume. The FHWA published a notice of the draft MOU in the Federal Register on November 16, 2016, with a 30-day comment period to solicit the views of the public and Federal agencies. After the end of the comment period, FHWA and UDOT considered comments and proceeded to execute the MOU. Effective January 17, 2017,

UDOT assumed FHWA's responsibilities under NEPA, and the responsibilities for NEPA-related Federal environmental laws described in the MOU.

Section 327(g) of Title 23, U.S.C., requires the Secretary to conduct annual audits during each of the first 4 years of State participation. After the fourth year, the Secretary shall monitor the State's compliance with the written agreement. The results of each audit must be made available for public comment. This notice finalizes the findings of the first audit report for UDOT participation in the NEPA Assignment program. The FHWA published a draft version of this report in the Federal Register on April 13, 2018, at 83 FR 16170, and made it available for public review and comment for 30 days in accordance with 23 U.S.C. 327(g). The FHWA received two responses to the Federal Register notice during the public comment period for the draft report. Neither of the comments were substantive. One comment from the American Road and Transportation Builders Association outlined their general support for this program. The second comment was from an anonymous individual and the comment was unrelated to the report. The FHWA considered both comments and determined that neither comment triggered changes in the content of the report. This notice includes the final version of the audit report.

Authority: Section 1313 of Public Law 112-141; Section 6005 of Public Law 109-59; 23 U.S.C. 327; 23 CFR 773.

Brandye L. Hendrickson,
Deputy Administrator,
Federal Highway Administration.

**Surface Transportation Project Delivery Program
FHWA Audit of the Utah Department of Transportation
January 17 – June 9, 2017**

Executive Summary

This report summarizes the results of the Federal Highway Administration’s (FHWA) first audit of the Utah Department of Transportation’s (UDOT’s) National Environmental Policy Act (NEPA) review responsibilities and obligations that FHWA has assigned and UDOT has assumed pursuant to 23 United States Code (U.S.C.) 327. Throughout this report, FHWA uses the term “NEPA Assignment Program” to refer to the program codified at 23 U.S.C. 327. Under the authority of 23 U.S.C. 327, UDOT and FHWA executed a Memorandum of Understanding (MOU) on January 17, 2017, to memorialize UDOT’s NEPA responsibilities and liabilities for Federal-aid highway projects and certain other FHWA approvals for transportation projects in Utah. Except for one project, which FHWA retained, FHWA’s only NEPA responsibilities in Utah are oversight and review of how UDOT executes its NEPA Assignment Program obligations. The MOU covers environmental review responsibilities for projects that require the preparation of environmental assessments (EA), environmental impact statements (EIS), and non-designated documented categorical exclusions (DCE). A separate MOU, pursuant to 23 U.S.C. 326, authorizes UDOT’s environmental review responsibilities for other categorical exclusions (CE), commonly known as “CE Assignment.” This audit does not cover the CE Program Assignment responsibilities and projects.

As part of its review responsibilities under 23 U.S.C. 327, FHWA formed a team in April 2017 to plan and conduct an audit of NEPA responsibilities UDOT assumed. Prior to the on-site visit, the audit team reviewed UDOT’s NEPA project files, UDOT’s response to FHWA’s pre-audit information request (PAIR), and UDOT’s self-assessment of its NEPA program. The audit team reviewed additional documents and conducted interviews with UDOT staff in Utah on June 5 - 9, 2017.

The UDOT entered into the NEPA Assignment Program after almost 9 years of experience making FHWA NEPA CE determinations pursuant to 23 U.S.C. 326 (beginning August 2008). The UDOT’s environmental review procedures are compliant for CEs, and UDOT is implementing procedures and processes for DCEs, EAs, and EISs as part of its new responsibilities under the NEPA Assignment Program. Overall, the audit team found that UDOT is successfully adding DCE, EA, and EIS project review responsibilities to an already successful CE review program. The audit team did not identify any non-compliance observations. This report describes five observations as

well as several successful practices the audit team found. The audit team finds UDOT is carrying out the responsibilities it has assumed and is in substantial compliance with the provisions of the MOU.

Background

The NEPA Assignment Program allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal-aid highway projects. Under 23 U.S.C. 327, a State that assumes these Federal responsibilities becomes solely responsible and solely liable for carrying them out in lieu of FHWA. Effective January 17, 2017, UDOT assumed FHWA's responsibilities under NEPA and other related environmental laws. Examples of responsibilities UDOT has assumed in addition to NEPA include section 7 consultation under the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and consultation under section 106 of the National Historic Preservation Act (54 U.S.C. 306108).

Following this first audit, FHWA will conduct three more annual audits to satisfy provisions of 23 U.S.C. 327(g) and Part 11 of the MOU. Audits are the primary mechanism through which FHWA oversees UDOT's compliance with the MOU and the NEPA Assignment Program requirements. This includes ensuring compliance with applicable Federal laws and policies, evaluating UDOT's progress toward achieving the performance measures identified in MOU Section 10.2, and collecting information needed for the Secretary's annual report to Congress. The FHWA must present the results of each audit in a report and make it available for public comment in the Federal Register.

The audit team consisted of NEPA subject matter experts (SME) from the FHWA Utah Division, as well as from FHWA offices in Sacramento, CA, Washington, DC, Atlanta, GA, and Austin, TX. These experts received training on how to evaluate implementation of the NEPA Assignment Program. In addition, the FHWA Utah Division designated an environmental specialist to serve as a NEPA Assignment Program liaison to UDOT.

Scope and Methodology

The audit team conducted an examination of UDOT's NEPA project files, UDOT responses to the PAIR, and the UDOT self-assessment. The audit also included interviews with staff and reviews of UDOT policies, guidance, and manuals pertaining to NEPA responsibilities. All reviews focused on objectives related to the six NEPA Assignment Program elements: program management; documentation and records

management; quality assurance/quality control (QA/QC); legal sufficiency; training; and performance measurement.

The focus of the audit was on UDOT's process and program implementation. Therefore, while the audit team reviewed project files to evaluate UDOT's NEPA process and procedures, the team did not evaluate UDOT's project-specific decisions to determine if they were, in FHWA's opinion, correct or not. The audit team reviewed 14 NEPA project files with DCEs, EAs, and EISs, representing all projects in process or initiated after the MOU's effective date. The audit team also interviewed environmental staff in all four UDOT regions as well as their headquarters office.

The PAIR consisted of 24 questions about specific elements in the MOU. The audit team used UDOT's response to the PAIR to develop specific follow-up questions for the on-site interviews with UDOT staff.

The audit team conducted 18 on-site and 3 phone interviews. Interview participants included staff from each of UDOT's four regional offices and UDOT headquarters. The audit team invited UDOT staff, middle management, and executive management to participate to ensure the interviews represented a diverse range of staff expertise, experience, and program responsibility.

Throughout the document reviews and interviews, the audit team verified information on the UDOT section 327 NEPA Assignment Program including UDOT policies, guidance, manuals, and reports. This included the NEPA QA/QC Guidance, the NEPA Assignment Training Plan, and the NEPA Assignment Self-Assessment Report.

The audit team compared the procedures outlined in UDOT environmental manuals and policies to the information obtained during interviews and project file reviews to determine if there are discrepancies between UDOT's performance and documented procedures. The team documented observations under the six NEPA Assignment Program topic areas. Below are the audit results.

Overall, UDOT has carried out the environmental responsibilities it assumed through the MOU and the application for the NEPA Assignment Program, and as such the audit team finds that UDOT is substantially compliant with the provisions of the MOU.

Observations and Successful Practices

This section summarizes the audit team's observations of UDOT's NEPA Assignment Program implementation, including successful practices UDOT may want to continue or expand. Successful practices are positive results that FHWA would like to commend UDOT on developing. These may include ideas or concepts that UDOT has planned but not yet implemented. Observations are items the audit team would like to draw UDOT's attention to, which may benefit from revisions to improve processes, procedures, or outcomes. The UDOT may have already taken steps to address or improve upon the audit team's observations, but at the time of the audit they appeared to be areas where UDOT could make improvements. This report addresses all six MOU topic areas as separate discussions. Under each area, this report discusses successful practices followed by observations.

This audit report provides an opportunity for UDOT to begin implementing actions to improve their program. The FHWA will consider the status of areas identified for potential improvement in this audit's observations as part of the scope of Audit #2. The second audit report will include a summary discussion that describes progress since the last audit.

Program Management

The UDOT has made progress toward meeting the initial requirements of the MOU for the NEPA Assignment Program under 23 U.S.C. 327, including implementing the updated Manual of Instruction (MOI), a (QA/QC) Plan, a Training Plan, and addressing the findings from a Self-Assessment Report.

Successful Practices

The audit team found that UDOT understands its project-level responsibility for DCEs, EAs, and EISs that FHWA assigned to UDOT through the NEPA Assignment Program. The UDOT has established a vision and direction for incorporating the NEPA Assignment Program into its overall project development process. This was clear in the PAIR responses and in interviews with staff in the regions and at UDOT's central office, commonly known as "the Complex."

The UDOT reorganized environmental staff to align employee roles with the new responsibilities under the NEPA Assignment Program. Staff at the Complex are responsible for EAs and EISs. Regional environmental staff coordinate their NEPA work through program managers at the Complex. Environmental staff also share resources and use the subject matter expertise of staff in other regional offices or at the Complex. Some staff responsibilities have changed under the NEPA Assignment Program, but positions

have remained the same. Prior to assuming responsibilities under the NEPA Assignment Program, regional staff reported to the pre-construction department in their regional office. Following assumption of the NEPA Assignment Program, Environmental Managers in the regions report to Environmental Program Managers at the Complex. In anticipation of assuming NEPA responsibilities, UDOT hired an Environmental Performance Manager who is responsible for overseeing UDOT's policies, manuals, guidance, and training under the NEPA Assignment Program.

Observations

Observation #1: Communication of UDOT policy and procedures to staff

Most SME and regional environmental staff were not aware of the latest policies and procedures regarding the NEPA Assignment Program. During interviews, some staff at the regional offices and at the Complex said they heard about changes at quarterly environmental meetings. Some regional staff said they expect to hear about changes from their managers in the regional office, but they often feel they do not receive all necessary information. Other regional staff said they receive updated memoranda and other communications about the NEPA Assignment Program through their program manager at the Complex. Some SMEs indicated they were unaware of how their specialty fits into the overall NEPA process. There does not seem to be a clear understanding among all staff about the differences between UDOT's responsibilities under 23 U.S.C. 326 and 23 U.S.C. 327 and how this affects staff members' roles and responsibilities in carrying out section 327.

Observation #2: Section 4(f) terms regarding determinations of use

During review of the NEPA project files, the audit team found some determinations labeled "n/a," suggesting Section 4(f) was not applicable when there was a historic site/historic property identified in the Section 106 determination of eligibility/finding of effect (DOE/FOE). In other examples, the files correctly indicate "yes" or "no" whether there is or is not a Section 4(f) use. When the DOE/FOE identifies historic properties that are eligible for inclusion in the National Register of Historic Places, UDOT would also need to evaluate whether the action will constitute a use under Section 4(f), per FHWA policy (see "3.2 Assessing Use of Section 4(f) Properties" in FHWA "Section 4(f) Policy Paper," 2012). Therefore, the correct determination should be "yes" or "no" instead of "n/a".

Documentation and Records Management

The audit team reviewed UDOT's NEPA project documents for 14 projects under the NEPA Assignment Program. The UDOT maintains a complete final record for DCEs,

EAs, and EISs. There are inconsistencies about how, when, and where staff maintain supporting draft and deliberative documentation, and staff either do not have or are not aware of protocols for recordkeeping.

Successful Practices

The UDOT uses a document database called “ProjectWise” to maintain final project records for DCEs, EAs, and EISs. Though it was not developed specifically for producing and maintaining environmental documents, ProjectWise is accessible to all staff and can store complete NEPA documentation. During interviews, UDOT environmental staff demonstrated they understood the minimum documentation that should be included in the final ProjectWise record, and the audit team verified that the minimum documentation is in NEPA project file reviews.

In interviews, some UDOT staff shared that they document decisions made verbally for the project record. This shows that some staff understand the importance of having a written record of decision points in the NEPA processes that may happen through phone conversations and in-person meetings.

Environmental managers at the Complex have taken steps to implement consistent records management on EAs and EISs in ProjectWise by adding stipulations to consultant contracts that require them to follow records management protocols in their final project files.

Observations

Observation #3: UDOT recordkeeping and file management

Some environmental staff interviewed during the audit said they store draft files, supporting information, and deliberative documentation on personal drives, on local servers, and/or in hardcopy filing cabinets. Thus, outside of ProjectWise, UDOT recordkeeping and file management is inconsistent, which may indicate the lack of specific protocols for managing supporting documents that inform NEPA decisions and other environmental determinations. Such practices can make document retrieval and review difficult because the location of UDOT’s file of record is unclear. This issue can also raise concerns about document retention practices and the completeness of administrative records for projects needing them.

Staff at the regional offices and at the Complex said ProjectWise does not include organizational tools such as subfolders or adequate search capabilities. ProjectWise was not created specifically for environmental documentation. It is a document management

system, and although it allows for subfolders with environmental documents storage, UDOT does not use this function nor does it have adequate functionality for searching files or tracking project environmental process milestones.

Quality Assurance/Quality Control

At the time of the first audit UDOT was in the early stages of the section 327 program, and because there was not yet sufficient data on project approvals, the team was not able to fully evaluate the effectiveness of the QA/QC component of the program. The audit team made the following observations.

Successful Practices

The UDOT has implemented some successful practices to ensure the quality of its NEPA documents. The UDOT developed a QA/QC plan to help environmental staff and consultants ensure documents are developed, reviewed, and approved in accordance with QA/QC procedures. The UDOT's use of DCE, EA, and EIS QA/QC checklists supports process standardization. Though regional environmental staff do not manage EAs or EISs under the NEPA Assignment Program, several staff said they were aware there is a QA/QC checklist for reviewing these documents. They were also aware that managers at the Complex review and submit the checklist and final document to UDOT's Deputy Director for final approval.

Regional environmental staff can contact program managers at the Complex to get procedural and technical assistance on topics or documentation requirements outside of their technical expertise area. Throughout the audit interviews, several staff said they felt comfortable calling managers at the Complex with questions.

Observations

Observation #4: QA/QC documentation

Although most environmental staff were aware of the QA/QC plan and checklists, the audit team learned through interviews that there is varied understanding about roles and procedures as they relate to documenting QA/QC approvals. Managers demonstrated that they understood the various roles and procedures for obtaining signature approval for final documents, but regional staff had a varied understanding of these procedures. Environmental staff outside of the Complex were also uncertain whether a new checklist was developed for DCEs, or if the EA/EIS checklist is used for DCE QA/QC.

Legal Sufficiency

Successful Practices

Through interviews, the audit team learned of the following successful practices: UDOT has extended the legal sufficiency process it has in place for Section 326 CE assignment to accommodate the section 327 NEPA Assignment Program by contracting with outside counsel who have extensive experience in NEPA, other environmental laws, and Federal environmental litigation. The UDOT environmental managers can work directly with outside counsel without the need to go through the Utah Attorney General's (AG) Office. An Assistant AG assigned to UDOT is kept apprised of all communications between UDOT staff and outside counsel. Outside counsel expects early legal involvement for all controversial projects. The UDOT, an Assistant AG, and outside counsel held an "organizational meeting" earlier this year and expect to hold regular, quarterly meetings.

Training

The UDOT's Training Coordinator is in the early stages of establishing a training management program ("UDOT U") for all UDOT employees. This program will include the following components: (1) core competencies for all UDOT employees; (2) training for all UDOT employees through UDOT U; (3) a portal for tracking training completed by UDOT employees; (4) SME identification and validation of training needs; and (5) leadership input on priorities and budgets for all disciplines. The UDOT could incorporate NEPA Assignment Program training needs into UDOT U in the future, and the Training Coordinator has plans to work with the environmental group on its specific needs.

Successful Practices

Through interviews and the PAIR response, the audit team learned that UDOT delivered several discipline-based (e.g., Noise, Section 4f, Section 7, Air Quality, and Legal Sufficiency) training courses to staff and consultants. The audit team learned that UDOT has used the Annual Conference to inform staff and consultants about the NEPA Assignment Program and the responsibilities that UDOT has assumed.

Observations

Observation #5: UDOT's training plan coordination

The UDOT developed a NEPA Assignment Program Training Plan, as required by the MOU, but through interviews the audit team found that environmental managers developed the plan with minimal coordination with the UDOT Training Coordinator, SMEs, or regional staff. In interviews, the audit team learned that some SMEs did not get opportunities to attend training on topics outside their subject area, including NEPA. An understanding of NEPA compliance is important for all environmental staff, including

SMEs. Although “UDOT U” has offered environmental training on specific topics such as stormwater and permitting, the NEPA Assignment Program training plan is not integrated into “UDOT U.”

Performance Measures

The Environmental Performance Manager has begun collecting and tracking performance data, such as the completeness of project records, timeline for completion of environmental documents, and whether QA/QC was performed for each document. The Environmental Performance Manager indicated that the results of this audit will be used to help revise manuals and procedures and that the Self-Assessment informed some changes. For example, the MOI has been updated to clarify which documents need to be updated and uploaded in projects files.

Successful Practices

The UDOT surveyed resource agency partners about how it is implementing responsibilities under the NEPA Assignment Program. Managers said they are striving to improve UDOT’s relationships with partner agencies despite having different missions and perspectives. The environmental group will continue to survey its partners in the future, and will modify the survey as needed to help improve UDOT’s environmental processes and relationships with resource agencies.

Finalizing the Report

The FHWA published a draft version of this report in the Federal Register on April 13, 2018, at 83 FR 16170, and made it available for public review and comment for 30 days in accordance with 23 U.S.C. 327(g). The FHWA received two responses to the Federal Register notice during the public comment period for the draft report. Neither of the comments were substantive. One comment from the American Road and Transportation Builders Association outlined their support for this program. The second comment was from an anonymous individual and the comment was unrelated to the report. The FHWA considered both comments and determined that neither comment triggered changes in the content of the report. This is FHWA’s final version of the audit report.

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